Peyton Packing Company, Inc., a Division of John Morrell & Co. *and* **Amalgamated Meat Cutters & Butcher Workmen of North America, Local #505, AFL-CIO, chartered by United Food and Commercial Workers International Union, AFL-CIO.** Case 28-CA-6136

March 25, 1981

DECISION AND ORDER

Upon a charge filed on October 17, 1980, by Amalgamated Meat Cutters & Butcher Workmen of North America, Local #505, AFL-CIO, chartered by United Food and Commercial Workers International Union, AFL-CIO, herein called the Union, and duly served on Peyton Packing Company, Inc., a Division of John Morrell & Co, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 28, issued a complaint on November 17, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on August 27, 1980, following a Board election in Case 28-RC-3813, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate as later corrected by the Board on September 5, 1980;[1] and that, commencing on or about September 5, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On November 17, 1980, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On December 8, 1980, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on December 15, 1980, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint Respondent denies that it unlawfully refused to bargain with the Union[2] and contends that the complaint should be dismissed because no evidentiary hearing was conducted concerning alleged material misrepresentations made by the Union shortly before the board-conducted election on May 8, 1980. In its response to the Notice To Show Cause, Respondent argues that it will be denied due process if not allowed to present evidence concerning these alleged misrepresentations at a hearing before an administrative law judge.

Our review of the record herein including that in Case 28-RC-3813, reveals that a petition was filed by the Union on March 21, 1980, seeking an election among certain office clerical employees at Respondent's facility at 400 Inglewood Drive, El Paso, Texas. Thereafter, pursuant to a Stipulation for Certification Upon Consent Election approved by the Regional Director for Region 28 on April 4, 1980, a secret-ballot election was conducted on May 8, 1980, which resulted in a tally of 14 votes for, and 10 against, the Union, with no challenged ballots. Respondent timely filed objections to conduct affecting the results of the election, contending that the Union made numerous material misrepresentations in a letter dated May 1, 1980, sent to unit employees, and that Respondent had insufficient time to respond to these misrepresentations.

The Regional Director conducted an investigation of the objections, and, on June 17, 1980, issued his Report and Recommendations on Objections To Conduct Affecting the Results of the Election. In his report, the Regional Director recommended that all of the Employer's objections be overruled and that a Certification of Representative issue.

On June 26, 1980, Respondent filed with the Board its exceptions to the Regional Director's report contending, *inter alia*, that the Union's misrepresentations warranted the setting aside of the

[1] Official notice is taken of the record in the representation proceeding, Case 28-RC-3813, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] With respect to this denial, we note that attached to the General Counsel's Motion for Summary Judgment is a copy of Respondent's letter to the Union, dated October 2, 1980, stating that Respondent would not comply with the Union's request for bargaining because the Board's certification of representation was invalid, due to the election's fundamental invalidity. Respondent has submitted nothing to controvert this document, or its contents. Accordingly, we deem this allegation of the complaint to be true. See *Georgia, Florida, Alabama Transportation Company*, 228 NLRB 1321 (1977).

election or in the alternative, the holding of a hearing on the questions of material fact raised by Respondent's objections. On August 27, 1980, the Board issued a Decision and Certification of Representative,[3] stating that it had reviewed the record in light of the exceptions and brief and that it adopted the Regional Director's findings and recommendations.[4] On September 5, 1980, the Board issued an Order Correcting the Decision and Certification of Representative by correcting said Decision to reflect the unit description agreed to by the parties.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[5]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a Delaware corporation with its principal office and place of business in Chicago, Illinois, and operates a facility at El Paso, Texas, where it has been engaged in the packing and nonretail sale and distribution of red beef and related products.

During the 12 months preceding issuance of the complaint herein, Respondent, in the course and conduct of its business operations, purchased and received goods and materials valued in excess of $50,000, which originated outside the State of Texas. We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Amalgamated Meat Cutters & Butcher Workmen of North America, Local #505, AFL-CIO, chartered by United Food and Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All office clerical employees, including cost accountant, live stock accountant and process meats staff assistant employed by the Employer at its facility located at 400 Inglewood Drive, El Paso, Texas; excluding all other employees, including plant production employees, truck drivers, truck driver helpers, stock yard employees, feed lot employees, feed mill employees, salesmen, cattle buyers, beef taggers, confidential employees, professional employees, assistants to managers of departments, managerial employees, guards and supervisors as defined in the Act.

2. The certification

On May 8, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 28 designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on August 27, 1980,[6] and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about September 5, 1980, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all

[3] Not reported in volumes of Board Decisions.

[4] From this ruling, it neccessarily follows that the Board found, without expressly so stating, that a hearing was not required to resolve the issues raised by Respondent's objections.

[5] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[6] Certification was corrected by the order of the Board issued on September 5, 1980.

the employees in the above-described unit. Commencing on or about October 2, 1980, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since October 2, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Peyton Packing Company, Inc., a Division of John Morrell & Co., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated Meat Cutters & Butcher Workmen of North America, Local #505, AFL-CIO, chartered by United Food and Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All office clerical employees, including cost accountant, live stock accountant and process meats staff assistant employed by the Employer at its facility located at 400 Inglewood Drive, El Paso, Texas; excluding all other employees, including plant production employees, truck drivers, truck driver helpers, stock yard employees, feed lot employees, feed mill employees, salesmen, cattle buyers, beef taggers, confidential employees, professional employees, assistants to managers of departments, managerial employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 5, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about October 2, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Peyton Packing Company, Inc., a Division of John Morrel & Co., El Paso, Texas its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Amalgamated Meat Cutters & Butcher Workmen of North America, Local #505, AFL-CIO, chartered by United Food and Commercial Workers International Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All office clerical employees, including cost accountant, live stock accountant and process meats staff assistant employed by the Employer at its facility located at 400 Inglewood Drive, El Paso, Texas; excluding all other employees, including plant production employees, truck drivers, truck driver helpers, stock yard employees, feed lot employees, feed mill employees, salesmen, cattle buyers, beef taggers, confidential employees, professional employees, assistants to managers of departments, managerial employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at the El Paso, Texas, facility copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, chartered by United Food and Commercial Workers Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All office clerical employees, including cost accountant, live stock accountant and process meats staff assistant employed by the Employer at its facility located at 400 Inglewood Drive, El Paso, Texas; excluding all other employees, including plant production employees, truck drivers, truck driver helpers, stock yard employees, feed lot employees, feed mill employees, salesmen, cattle buyers, beef taggers, confidential employees, professional employees, assistants to managers of departments, managerial employees, guards and supervisors as defined in the Act.

PEYTON PACKING COMPANY INC., A DIVISION OF JOHN MORRELL & CO.